Engelhard Corporation *and* Local 1430, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Cases 2–CA–32909 and 2–CA–33080

June 18, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On April 27, 2001, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

Introduction

This case concerns the interpretation of a no-strike/no-lockout clause in a collective-bargaining agreement. Relying on its interpretation of that clause, the Respondent suspended 38 employees because they picketed its shareholders' meeting (over 70 miles from the facility where the employees worked). For the reasons set forth below, we agree with the judge that the employees did not contravene the no-strike/no-lockout provision when they engaged in the picketing. We conclude, therefore, that the Respondent's suspension of the employees violated Section 8(a)(3) and (1). We further agree with the judge that the Respondent violated Section 8(a)(1) when it published two letters in the plant that threatened the employees with discipline and discharge for engaging in picketing, and when it videotaped the picketing employees.[3]

Factual Background

The facts, as more fully set forth in the judge's decision, are not disputed. The Respondent and the Union signed a collective-bargaining agreement (CBA or bargaining agreement) that contained the following no-strike/no-lockout clause (art. 28):

> The Employer and the Union declare it to be their intention to prevent any suspension of work due to labor disputes during the term of this Agreement. To carry out this intention, the Employer agrees that there shall be no lockout of any of its Employees or discrimination against them because they have raised a dispute or grievance. The Union agrees that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever. The Union further agrees that any Employee engaging in an unauthorized strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business, shall be subject to immediate discharge at the discretion of the Employer with no recourse to the grievance procedure contained herein.
>
> However, the Employer agrees it will not hold the Union responsible for damages resulting from any such unauthorized action if the Union takes immediate action to advise all Employees that such unauthorized action is unauthorized and that Employees participating will be subject to discipline, up to and including discharge.

The bargaining agreement was due to expire on June 30, 2000.[4] The Respondent and the Union held negotiations on March 8, 21, and 27, but stopped without setting a new date for further negotiations. The Union wanted the Respondent to return to the bargaining table. To put pressure on the Respondent to give the Union a date for resumption of negotiations, the Union decided to picket the Respondent's May 4 shareholders' meeting at a hotel in Woodbridge, New Jersey, over 70 miles from the Respondent's plant in Peekskill, New York.

On April 28, the Union called the Respondent to provide notice of its plans to picket the shareholders' meeting. The Respondent advised the Union that, in its view, the proposed picketing violated the no-strike/no-lockout clause. The Union replied that article 28 did not apply to peaceful informational picketing of a shareholders' meet-

[1] There are no exceptions to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by threatening to move its facility if the Union sought a 6-percent wage increase in upcoming negotiations, and that the Respondent violated Sec. 8(a)(3) and (1) by denying employee Karen Nembhard an excused absence for attending a shop steward training.

[2] We shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) and *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[3] The Respondent argues that Sec. 10(b) of the Act precluded the amended charge of surveillance. The judge, citing *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), rejected this argument on the grounds that the allegation shared the same legal theory, arose from the same factual circumstances and sequence of events, and involved the same defenses as the allegation that the Respondent violated Sec. 8(a)(1) when it threatened to discipline employees if they participated in the authorized picketing. We agree with the judge.

[4] All dates hereafter are in 2000 unless noted otherwise.

ing, but applied only to concerted activity that results in a work stoppage, which was not what the Union planned.

The same day, the Respondent sent a letter (the "April 28 letter") to the Union that expressed the Respondent's position that the planned picketing violated the contractual no-strike/no-lockout clause. It also warned that any employee who engaged in picketing would be subject to immediate discharge. The Respondent posted the letter in the plant.

On May 4, about 50 of the Respondent's employees, together with 15–20 individuals not employed by the Respondent, participated in a demonstration outside the Sheraton Hotel in Woodbridge, New Jersey, the site of the Respondent's shareholders' meeting. None of the participants chanted, blew whistles, or otherwise made any noise. Rather, the demonstrators engaged in a silent protest, and obeyed all of the rules set forth by the police. Some of the nonemployees wore picket signs and distributed handbills; none of the Respondent's employees engaged in either of those actions. The Respondent's employees stood next to the picketers and handbillers.

It is undisputed that the Respondent videotaped the demonstrators. At the hearing, the Respondent asserted that it wanted to record the picketing in case the participants attempted to disrupt the meeting or the Respondent decided to seek an injunction. Although the Respondent conceded that the picketing was neither violent nor disruptive, it nevertheless used the tape to identify those employees who attended the demonstration.

On May 12, the Respondent sent a second letter to the Union and posted it in the plant. The letter reiterated the Respondent's position set forth in the April 28 letter, and stated that the Respondent had decided to take formal disciplinary action against both the employees who participated in picketing and the Union for violating article 28 of the bargaining agreement. The letter stated that although the Respondent had the right to terminate the participating employees, it had decided to suspend each of them for 3 workdays. Thereafter, the Respondent suspended 38 employees for 3 days, stating: "[t]he reason for this suspension is your violation of Paragraph 28 of the Collective Bargaining Agreement, which occurred on May 4, 2000."

The Union filed grievances concerning the suspension, which the Respondent refused to process on the grounds that they were not grievable under the provisions of article 28.

Analysis and Conclusions

Any waiver by a union of the statutory rights of represented employees must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).[5] Here, that standard was not satisfied.

We agree with the judge's analysis and conclusions set forth in section IIIC, 2 through 4 of his attached decision. Specifically, we affirm his finding that article 28 does not constitute a clear and unmistakable waiver by the Union of the employees' right to engage in the May 4 picketing of the shareholders' meeting in Woodbridge, New Jersey. The parties' mutually expressed intent in undertaking their correlative obligations in article 28 is plain: to prevent any suspension of work due to labor disputes. Article 28 was expressly intended to prohibit conduct that would reasonably lead to the suspension of work. The picketing of the shareholders' meeting in Woodbridge, New Jersey, could not reasonably be expected to (and in fact did not) lead to the suspension of any work at the Respondent's plant over 70 miles away in Peekskill, New York.[6] Thus, we affirm the judge's finding that the May 4 picketing in question was not prohibited by article 28, but was instead protected by Section 7 of the Act. Consequently, we affirm the judge's findings and conclusions that the Respondent unlawfully threatened to discipline employees for participating in the picketing, engaged in unlawful surveillance of their activity, unlawfully suspended employees who partici-

[5] "The rationale for applying the 'clear and unmistakable' standard to waivers of strike rights is this: if a union is negotiating away employees' rights that are fundamental to the collective bargaining process, any proposed contract must unambiguously put those employees on notice of the waiver." *Children's Hospital Medical Center of Northern California v. California Nurses Assn.*, 283 F.3d 1188, 1192 (9th Cir. 2002).

[6] The Respondent argues that the picketing in New Jersey caused suspension of some work at the plant in New York. But the record establishes that only three of the employees who attended the picketing had actually been scheduled to work during the time of the picketing, and that all three of them had received advance permission from the Respondent to take that day off from work, either as a personal day or a vacation day. The Respondent nevertheless asserts that on the day of the picketing, some employees at work pressured other employees to decline to work voluntary overtime, which the Respondent assertedly needed to compensate for the absence of six or seven production employees that day (including the three referred to above who had been given permission by the Respondent to take the day off). We agree with the judge that the Respondent has failed to establish that the events of May 4 caused a loss of production. The Respondent cites to *Elevator Mfrs. Assn. of New York v. Local 1, Intern. Union of Elevator Constructors*, 689 F.2d 382 (2d Cir. 1982) in support of its position. We find this case distinguishable because in that case all of the employees refused to perform *emergency* overtime work for several months. Id. at 384. Consequently, the employer was unable to provide emergency service to its customers. In this case, the Respondent was short by only six or seven employees for one shift, and most of those absences were not related to the picketing. As noted above, the Respondent has not provided any evidence that its business suffered a slowdown or was otherwise interrupted by this deficit.

pated, and unlawfully threatened to discipline employees if they participated in further picketing.

Our dissenting colleague proposes that the Union's obligations in the third sentence of article 28 should be read in isolation, without regard to the prefatory and explanatory language in the first and second sentences. But this reading runs contrary to fundamental principles of contract interpretation. In interpreting a no-strike/no-lockout clause, "the parties' actual intent governs, 'whether that intent is established by the language of the clause itself, by the inferences drawn from the contract as a whole, or by extrinsic evidence.'" *Silver State Disposal Service*, 326 NLRB 84, 86 (1998), quoting *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). Here, the parties did not present any extrinsic evidence. Therefore, the only evidence of the parties' intent is the language of article 28 itself. The first sentence expresses the parties' mutual intention to prevent any suspension of work due to labor disputes, and it thus informs the nature of the particular obligations undertaken by the Respondent and the Union in the second and third sentences, respectively. The Union's undertakings in the third sentence are obviously its quid pro quo for the Respondent's undertakings in the second sentence.

In sum, the parties' mutual statement of intent in the first sentence, to prevent the suspension of work due to labor disputes, qualifies and informs the parties' mutual undertakings in the second and third sentences. Consequently, the third sentence cannot reasonably be read in isolation, as our colleague would read it. And, for the reasons set forth above, we find that the picketing of the shareholders' meeting could not reasonably have been expected to (and in fact did not) lead to the suspension of any work at the plant, and was thus not prohibited by article 28.

Because the "clear and unmistakable standard" is well established, the Respondent and the Union presumably knew that *unambiguous* contractual language would have been necessary to create an absolute prohibition against picketing. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (collective-bargaining agreement "must be read as a whole, and in the light of the law relating to it when made").[7] The parties surely would not have used the "suspension of work" language if their intent was to foreclose picketing that did *not* involve a suspension of work. At a minimum, the "suspension of work" language means that the contract can be reasonably interpreted to prohibit only picketing that results in a suspension of work. The courts have interpreted similar language to find that parties did, in fact, intend to waive the right to engage in a sympathy strike, which of course entails a suspension of work.[8] Even assuming that a contrary interpretation—such as the one offered by the dissent—is *also* reasonable, this would at most demonstrate that the contract is ambiguous.

There is no extrinsic evidence, meanwhile, that the parties contemplated the unusual context in which the waiver issue arises here: informational picketing, many miles away from the worksite, directed at the company's shareholders (not its employees).[9] And if the situation presented in this case was unanticipated, it is hard to see how a waiver can be based, as it must be, on the parties' mutual consent.

Given the contractual language and the absence of extrinsic evidence, the Respondent cannot meet its burden of proving that the Union waived the employees' protection under Section 7, because the Respondent has not shown that article 28 clearly and unmistakably applies to picketing that does not result in a "suspension of work." See *Silver State Disposal Service*, supra (finding no-strike clause that referred only to strikes called, encouraged, or condoned by union did not clearly and unmistakably apply to unauthorized wildcat strike). Here, the clause itself describes its purpose as the prevention of "any suspension of work."

Contrary to our colleague's claim, we are not rewriting article 28 to fit our views of what actions should be proscribed by it. Rather, we take the contract as we find it. Nor are we declaring that the Union's picketing the shareholders' meeting was less likely to threaten or result in a suspension of work than the Respondent's discrimination against an employee for filing a grievance. We have no need to make such a comparison. The fact is, however, that the Respondent has no right to discriminate against employees for filing a grievance. The employees, on the other hand, had a protected right under Section 7 of the Act to picket the shareholders' meeting, as set forth by the judge in the first paragraph of section IIIC, 2 of his attached decision. The question for us here has been whether the judge correctly found that the lan-

[7] Cf. *Electrical Workers Local 803 v. NLRB*, 826 F.2d 1283, 1296–1297 (3d Cir. 1987) (finding waiver of right to sympathy strike based on interpretation of the contract in light of prevailing law at the time the contract was entered into).

[8] *Electrical Workers Local 803 v. NLRB*, supra, 826 F.2d at 1296 (contract expresses "mutual purposes to maintain service without interruption"); *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986) (language evidencing employees' commitment to facilitate the delivery of uninterrupted service); *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 778–779 (7th Cir. 1983) (court examined a "collective bargaining agreement structured to meet the challenge of foreign competition and a goal of 'uninterrupted operations' stated and reiterated in clear and unmistakable terms").

[9] We have found no decision, and the dissent cites none, that addresses a factually similar situation.

guage of article 28 does not constitute a clear and unmistakable waiver of the employees' Section 7 right to picket the shareholders' meeting. For the reasons discussed above and in the judge's decision, we find that there was no waiver, and consequently that the Respondent's discipline of employees for engaging in protected picketing violated the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent, Engelhard Corporation, Peekskill, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Engaging in surveillance of employees engaged in union activities or protected concerted activities."

2. Substitute the following for paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 18, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

I. INTRODUCTION

The Respondent and Union executed a collective-bargaining agreement in which the Respondent agreed to refrain from locking out employees or discriminating against them because they raised a dispute or grievance. The Union, for its part, expressly agreed:

> that it will not call, participate in, or sanction *any* strike, boycott, picketing, work stoppage, or slow-down *whatsoever* (emphasis added).

Despite the Union's pledge, it sponsored a picketing and handbilling demonstration at the Respondent's shareholders' meeting on May 4, 2000. In response, the Respondent disciplined 38 employees who participated in the demonstration by suspending them 3 days' time.

My colleagues and the judge find the suspensions unlawful. They do so by ignoring the plain meaning of the parties' no strike/no lockout pledge and instead adopt a highly improbable construction inconsistent with the express language of the parties' agreement.

For these reasons, I respectfully dissent.

II. FACTS

Article 28 of the collective-bargaining agreement scheduled to expire on June 30, 2000,[1] provides as follows:

> The Employer and the Union declare it to be their intention to prevent any suspension of work due to labor disputes during the term of this Agreement. To carry out this intention, the Employer agrees that there shall be no lockout of any of its Employees or discrimination against them because they have raised a dispute or grievance. The Union agrees that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever. The Union further agrees that any Employee engaging in an unauthorized strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business, shall be subject to immediate discharge at the discretion of the Employer with no recourse to the grievance procedure contained herein.
>
> However, the Employer agrees it will not hold the Union responsible for damages resulting from any such unauthorized action if the Union takes immediate action to advise all Employees that such unauthorized action is unauthorized and that Employees participating will be subject to discipline, up to and including discharge.

However, when early negotiations for a successor agreement broke down, the Union decided to picket the Respondent's annual shareholders' meeting to pressure Respondent to resume bargaining. Informed of the Union's plan, Respondent's director of human resources advised employees and the Union that the picketing would be an "unauthorized job action" in violation of article 28 and employees participating in it would be subject to immediate dismissal.

[1] All dates are in 2000.

The Union authorized and conducted its planned demonstration at the shareholders' meeting on May 4. Approximately 50 of the Respondent's employees attended the demonstration, accompanied by 15–20 nonemployees who picketed and handbilled. The Respondent, fearing a disruption of the meeting, videotaped the demonstration. Thereafter, the Respondent suspended 38 employees for 3 days because they violated article 28 by participating in the May 4 event. Also in response to rumors of future picketing, it posted a letter to employees repeating its view that such picketing is in violation of article 28 and would subject participating employees to immediate dismissal.

The judge, whose reasoning is adopted by my colleagues, found the suspensions violated Section 8(a)(3). He also found that Respondent's surveillance of the May 4 demonstration and its letters threatening to discharge employees for picketing violated Section 8(a)(1). He rejected the Respondent's argument that article 28 expressed a clear and unmistakable waiver by the Union of the employees' statutory rights to picket. Emphasizing the introductory sentence of article 28 declaring the parties' intention to "prevent any suspension of work," the judge concluded that "Article 28, when properly read as a whole, sets forth a clear intention by the parties that picketing is prohibited where it leads to a suspension of work due to labor disputes." Absent any showing that a suspension of work resulted from the May 4 picketing, he found the demonstration did not violate the contract. Moreover, relying on the language of article 28 permitting the immediate discharge of employees who engage in "unauthorized . . . picketing," the judge found Respondent could issue no discipline to employees who participated in the picketing because it was not "unauthorized" by the Union.[2]

III. ANALYSIS

The issue of contract interpretation presented here is a familiar one, as is the governing precedent. A contractual waiver of a statutory right such as the right to picket in support of a primary economic dispute must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 705, 708 (1983). My colleagues in the majority and I do not disagree that article 28 contains a clear and unmistakable waiver of the statutory right to engage in certain kinds of economic action, *including picketing*. We disagree on the breadth of the waiver. The Union, with whom my colleagues and the judge agree, says the waiver in article 28 is limited to economic actions that lead to a suspension of work due to labor disputes. The Respondent denies that article 28 is so limited.

In my view, the plain meaning of the contract language supports the Respondent's position. In finding otherwise, my colleagues first misread the provision's introductory sentence and then assign far more weight to it than that passage can bear. In their view, the plain meaning of the parties' no-lockout/no-strike pledge is not its actual meaning. They find that the Union's waiver of the right to engage in picketing did not really mean "any . . . picketing . . . whatsoever" even though that is exactly what the contract says.

The Board has consistently held that the ordinary, plain meaning of a contract term is paramount in determining its meaning. See *Mining Specialists*, 314 NLRB 268, 269 (1994).[3] Here, the no-strike/no-lockout clause in article 28 is a carefully drafted expression of the parties' interdependent obligations. It is quite true, as the majority says, that the prefatory sentence of the clause articulates the parties' "intention to prevent any suspension of work due to labor disputes during the term of this Agreement." I do not ignore that sentence, as my colleagues suggest; rather, I read it in context. Thus, the broad prohibitions in the sentences that follow were agreed to by the parties to carry out this intention. As shown below, some of the actions the parties chose to prohibit seem unlikely to risk a suspension of work; indeed, in most workplaces a suspension of work likely would *not* result. However, it was for the parties to decide how best to carry out their intent. It is not for us to superimpose our judgment on the choices the parties made.

For example, in the second sentence of article 28 the Respondent agrees not to lock out its employees or to discriminate against them for raising a dispute or grievance. An economic lockout does not necessarily entail any "suspension of work." Rather, an employer is entitled to employ temporary replacements to continue its operations without interruption. Likewise, an employer could readily discriminate against an employee without threatening or resulting in a suspension of work, yet the act of discrimination itself is explicitly prohibited. Un-

[2] In reaching this conclusion, the judge clearly misconstrued article 28. The first three sentences of article 28 prohibit the Employer and the Union from engaging in certain conduct. The fourth sentence addresses itself to actions taken by employees independently of any party. Specifically, it provides that any employee engaging in an "*unauthorized* strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business, shall be subject to immediate discharge at the discretion of the Employer with no recourse to the grievance procedure contained herein." That sentence is not applicable here because the picketing was authorized by the Union.

[3] Under extant Board law, the Board will also look to relevant extrinsic evidence, such as the past practice of the parties in implementing the provision or its bargaining history. *Mining Specialists*, supra. Here, no such extrinsic evidence was offered by either party.

der my colleagues' reading of article 28, however, the Respondent could, by employing a sufficient number of replacement workers to prevent any interference with production, lock out the entire unit without running afoul of its obligations. The Respondent could also discriminate against employees who file grievances without contravening article 28, provided its acts of discrimination do not result in a suspension of work. Why, one asks, would the Union bargain for relief from economic lockouts and discrimination only in these limited circumstances? Respectfully, such a reading of the clause is illogical and robs it of common sense.

The error of my colleagues' reading of article 28 is evident upon consideration of the obligations the Union assumed. This is evident from the language of the Union's no-strike pledge itself. The Union pledged "that it will not *call*, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever." Since it is possible to call a strike without thereafter engaging in one, the Union's obligation applies even when no actual interference with production is shown. Thus, the Union's article 28 obligations, like the Respondent's, must be read to apply even when there is no actual interference with production.[4]

The broad language used in article 28 to describe the types of prohibited activity confirms that it applies even when no interference with production is shown. The parties did not agree to prohibit picketing in certain areas or at certain times, but "any" picketing "whatsoever." The use of "any" and "whatsoever" in describing the scope of union activities prohibited manifests an all-inclusive approach, not limited to those actions that cause a suspension of work. See *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, "one or some indiscriminately of whatever kind."); Webster's Collegiate Dictionary 1340 (10th ed. 2001) (defining "whatsoever" as "of any kind at all."). In *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir. 1986), the court described a no-strike clause banning "any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business" as one of "extraordinary breadth: in the style of the draftsman determined to allow no loopholes." Likewise, here, the narrow reading placed on article 28 by my colleagues is unwarranted.

The majority's approach is contrary to the instruction of the D.C. Court of Appeals that the language used by the contracting parties be read in light of "the realities of labor relations and consideration of federal labor policy, which make up the background against which such agreements are entered." *Electrical Workers Local 1395 v. NLRB*, supra, 797 F.2d at 1033. On this point, while addressing the question of whether a general no-strike clause covered sympathy strikes, the court said:

> In our view, federal labor policy is more threatened by the interposition of artificial rules of construction upon the parties' mutual intent . . . than by the Board's practice of giving effect to the clear import of contractual language. . . . A grudging or stilted interpretation of collective-bargaining agreements tends to encroach upon the fundamental national policy favoring the ordering of the employer-employee relationship by voluntary bargaining rather than governmental fiat, [and] it injects into the collective bargaining process an uncertainty that diminishes the prospects of successful bargaining."

Id. at 1031–1032 (citations omitted).

Rather than accept the plain meaning of the broad waiver language in article 28, my colleagues contravene Board practice and insist on just the kind of "grudging and stilted interpretation" criticized by the court. If the parties truly intended only this limited and highly unusual quid pro quo surrender of economic weapons, it seems likely they would have done so by terms more specific and obvious than their prefatory declaration of intent to "prevent any suspension of work due to labor disputes" which my colleagues seize upon.

Assuming we had a warrant to rewrite article 28 to fit our own views of which actions should be proscribed, it seems nothing short of hubris for the majority to declare that picketing the Respondent's shareholder's meeting, which the Respondent reasonably feared would result in a disruption, is less likely to threaten or result in a suspension of work than discrimination by the Respondent against an employee for filing a grievance—conduct expressly prohibited by article 28. Yet the inescapable consequence of the majority's position is that article 28 applies only to the latter.

The majority claims that their decision is dictated by the "clear and unmistakable waiver" standard. I do not agree. To carry out their intention to "prevent any suspension of work due to labor disputes" the parties agreed

[4] In their zeal to reach their desired result, the majority also rewrites the first sentence of article 28, on which they rely so heavily. That sentence describes the parties' intent as *preventing* any suspension of work. My colleagues, however, require an actual suspension of work before they would find a particular action proscribed. A reading of article 28 to encompass both actions that actually result in the suspension of work and actions, like the picketing at issue here, that may lead to a suspension of work in the future gives the fullest effect to the parties' stated goal of prevention. My colleagues thus effectively read the word "prevent" out of article 28 as well.

to no picketing "whatsoever." At bottom, the majority's reading of article 28 appears to be premised on the notion that the Respondent's employees *should* have the right to picket its shareholders' meeting. But "no federal policy is disserved when a union is permitted freely to enter into agreements limiting its recourse to economic weapons in exchange for 'gains it considers of more value to its members.'" *Electrical Workers Local 1395*, 797 F.2d at 1031 (quoting *Metropolitan Edison v. NLRB*, 460 U.S. 693, 709 (1983)). The same can be said of the employer. Accordingly, the Board has consistently held that a waiver of Section 7 rights may be recognized, consistent with the clear and unmistakable standard, through the "ordinary and reasonable meaning" of contractual language, and does not require that every alternative reading, however fanciful or illogical, be disproved. See *Silver State Disposal Service*, 326 NLRB 84, 86 (1998) (quoting *Rockaway News Supply Co. v. NLRB*, 345 U.S. 71, 79 (1953)). Yet in a real sense that is what the majority requires.

Worse yet, in purporting to apply the clear and unmistakable waiver standard, my colleagues say that, because there is no extrinsic evidence that the parties contemplated the specific type of picketing that took place here, the application of the clause to it was not anticipated by the parties and therefore could not be based on their mutual consent. This novel proposition does violence to the settled rule that, in assessing the scope of a broadly phrased no-strike clause, "the unexpressed reservations of employees cannot be treated as dispositive; since a union's surrender of the right is not disfavored by reason of national labor policy (as, for instance, in *Mastro Plastics)*, a court's task is simply to interpret the parties' manifestations of mutual consent." *Electrical Workers Local 1395 v. NLRB*, 797 F.2d at 1033.

Instead of leaving the parties with the agreement they struck, the majority declares that picketing the Respondent's shareholder's meeting—action which the Respondent feared would result in a disruption—is permissible because in my colleagues' opinion it could not reasonably be expected to result in a suspension of work. The parties, however, did not proscribe picketing that could reasonably be expected to result in a suspension of work. They established a bright line objective standard proscribing all picketing "whatsoever." Even if we were to inject ourselves into the parties' decision-making, however, it does not take a fertile imagination to appreciate that picketing a shareholder's meeting can exacerbate tensions and foster labor disputes which could eventually result in a suspension of work.

IV. CONCLUSION

Based on the foregoing, I dissent from my colleagues' disregard for the plain meaning of the parties' no-strike/no-lockout pledge and their consequent finding that the suspension of the employees who engaged in the May 4 picketing action was unlawful. The picketing was not protected by Section 7 of the Act because the Union clearly and unmistakably waived its own and its represented employees' right to engage in such activity during the term of the parties' collective-bargaining agreement. Because the picketing was unprotected, the Respondent did not violate Section 8(a)(3) when it disciplined its employees. For the same reason, it did not violate Section 8(a)(1) by threatening to discipline employees who engaged in picketing and by videotaping the picketing itself. I would reverse the judge and dismiss the complaint.

Dated, Washington, D.C., June 18, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discriminate against our employees for participating in union activities or protected concerted activities.

WE WILL NOT engage in surveillance of our employees engaged in union activities or protected concerted activities.

WE WILL NOT threaten our employees with discharge if they engage in union activities or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them:

> Christopher Bahr, Gregory Borelli, Eric Camper, Wayne Cantrell, Arthur Chase, Carlos Colmenares, Roger Croft, Joseph Dendera, Vincent Diaz, Dallas Dickens, Peter DiNapoli, Warren Dunn, Lori Elsner, Nelvis Esteves, Carlos Fernandes, Francis Hard, Pamela Hard, James Hamilton, Ron Hyslop, John Keels, Thomas Kimbrew, Bernard Kopf III, James Mahoney, George Hans, Dana Mason, Kathleen Nenni, James Papa, Marcus Ruff, Richard Selleck, George Sekel, Marc Sierzega, Daniel Smetana, William Sinzer III, Paul Szlenka, Jeffrey Tomlins, Robert Vitolo, Donald Vassallo, Keith Urban.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

ENGELHARD CORPORATION

Olga Torres, Esq., for the General Counsel.
Douglas Duerr and *Stan Wilson, Esqs. (Elarbee, Thompson & Trapnell, LLP)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges filed on April 3, May 1, and June 19, 2000,[1] by Local 1430, International Brotherhood of Electrical Workers, AFL–CIO (Union), a consolidated complaint was issued on September 13 against Engelhard Corporation (Respondent).

The complaint, as amended at the hearing, alleges essentially that Respondent (a) threatened to move its facility if the Union sought a six-percent wage increase in upcoming negotiations and (b) denied Union Shop Steward Karen Nembhard an excused absence for attending shop steward training despite having previously granted such an excused absence to her.

The complaint further alleges that the Union and bargaining unit members engaged in handbilling at Respondent's stockholders' meeting in support of the Union's demands for a successor contract. It is alleged that with respect to such activity, Respondent (a) threatened employees with discipline including immediate discharge if they engaged in such activity; (b) engaged in surveillance of its employees while they engaged in such activity; (c) threatened employees with discharge for participating in such activity; and (d) suspended employees for engaging in such activity.

Respondent denied the material allegations of the complaint and asserted the affirmative defenses that (a) the complaint should be dismissed pursuant to Section 10(b) of the Act, and (b) the Union and its members waived their right to engage in picketing and changed the terms of the collective-bargaining agreement without first bargaining with Respondent. On December 20 and 21, a hearing was held before me in New York City.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, having an office and place of business in Peekskill, New York, has been engaged in the manufacture and wholesale distribution of pigments and film products. In the annual conduct of its business operations, Respondent sells and ships goods from its Peekskill, New York facility valued in excess of $50,000 directly to points outside New York State, and during the same period purchases and receives products, goods and materials at its Peekskill facility valued in excess of $50,000 directly from points outside New York State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Threat to Move the Plant

The complaint alleges that on February 1, Respondent threatened to move its facility if the Union were to seek a six-percent wage increase in the upcoming negotiations for a successor contract.

The Union represents about 288 employees employed in five facilities of the Respondent. The collective-bargaining agreement was due to expire on June 30, 2000.[2] The parties agreed to begin early negotiations in an attempt to resolve their differences in advance of the expiration date. Actual negotiations began on March 8.

On February 1, union representatives met with their negotiating committee in order to discuss their final contract demands, including their wage proposal. The Union's committee decided it wanted a six-percent wage raise in each of the 3 years of the contract.

Later that day, Respondent and the Union met for the purpose of resolving certain pending grievances. Present in behalf of Respondent were Margaret Gibson, manager of human resources, Frank Lamson-Scribner, plant manager, and Nancy Delaney, the labor relations coordinator and admitted agent of

[1] All dates hereafter are in 2000 unless otherwise stated.

[2] A successor contract, which runs from July 1, 2000 to June 30, 2003 is currently in effect.

Respondent. Present for the Union were Business Agent Robert Meyer and Jeffrey Tomlins, chief shop steward.

Meyer and Tomlins testified that at the end of the grievance meeting, the subject of the upcoming negotiations was raised. They both quoted Lamson-Scribner as saying that if the Union was seeking six percent it is not "going to happen." Meyer responded that that amount was exactly what the Union sought. Meyer and Tomlins stated that Gibson then said that if the Union demanded six percent the Company would move its plant "down south."

Meyer stated that the meeting ended immediately thereafter and he told Tomlins to make a note of Gibson's comment in the event that it "came up later." Tomlins asked him if her statement could be made the subject of an unfair labor practice charge, and Meyer said it could but that they would not necessarily use it "at this time." Tomlins stated that Meyer told him that he would take no action then because he did not want to begin negotiations "on the wrong foot." Both Meyer and Tomlins made notations in their datebooks of Gibson's remark that if the Union asked for six percent the Company would move its plant down South.

Respondent has a plant in Charleston, South Carolina which makes pearlescent pigments which are also manufactured in the Peekskill plant. However, according to Lamson-Scribner, the two plants do not make the same products. Nevertheless, it appears that the Charleston facility manufactured some of the products that Peekskill formerly made, and that all the products made in Charleston were once made in Peekskill.

Lamson-Scribner testified that he began the conversation by stating that the parties made much progress during his short tenure with Respondent but that he was concerned that employees' expectations were too high and he did not want them to experience a "let-down" in July. Meyer responded that Respondent should not "plan on giving us the same thing, we want our fair share," which was more than three percent per year.

Respondent's witnesses Gibson, Lamson-Scribner, and Delaney all testified consistently concerning the grievance meeting. They agreed that Lamson-Scribner told the Union's representatives that they should not expect a six-percent increase per year, but all three denied that Gibson threatened that if the Union asked for a six-percent raise the company would relocate to the South. Gibson would only concede that she told the union agents that she hoped that they had "reasonable expectations" about Respondent's offer. Delaney testified that if Gibson had threatened to move the plant it would have made a distinct impression upon her and she would have "questioned" it since the economic livelihood of her family depended upon the Company, inasmuch as she and her husband are both employed by Respondent in Peekskill.

Respondent's witnesses' testimony also contradicted that of the Union's representatives as to the timing of the conversation. Respondent's witnesses stated that the six-percent topic arose in the beginning of the meeting whereas the Union's agents stated that they discussed the matter at the very end of the meeting. Meyer's testimony as to the timing is supported by his further testimony that he made the notation in his datebook within 1 to 2 minutes after Gibson's statement. Since he and Tomlins stated that the comment was made at the end of the meeting and since Tomlins stated that they remained in the room until Respondent's representatives left at which time Meyer made the notation, it would logically follow, assuming Meyer to be correct, that Gibson's alleged threat was made at the end of the meeting.

The charge and the amended charge allege as follows: Since on or about February 1, 2000, the employer has threatened to close its operations if contract negotiations did not go their way."

B. The Alleged Denial of an Excused Absence to Shop Steward Karen Nembhard

Respondent's absenteeism policy provides that employees are allowed up to 10 excused absences without pay per year for whatever reason the employee wishes including illness, personal business, and family emergency. More than 10 absences result in progressive discipline, from an oral warning to discharge. Absences for union business are considered an excused absence and are not counted toward the 10-absence limit.

The complaint alleges that Respondent denied Union Shop Steward Karen Nembhard an excused absence for attending shop steward training despite Nembhard having previously been granted an excused absence by Human Resources Manager Gibson. It is alleged that Respondent denied the excused absence because "employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities."

The Union planned a 2-day training session for its shop stewards to take place on Saturday and Sunday, April 29 and 30, from 8 a.m. to about 5 p.m. each day. The Union requested and received permission for 2 days' excused time off for the five stewards who were scheduled to work that weekend.[3]

Nembhard works on the D, night crew. Of the stewards scheduled to attend the training, Nembhard was the only night-shift employee scheduled to work that weekend. For the period of time encompassing the training she was scheduled to work on Friday, Saturday, and Sunday, April 28 through April 30, from 7 p.m. to 7 a.m. each day. This schedule would have required her to report to work on Friday night, complete her 12-hour work day and leave at 7 a.m. Saturday morning, go directly to the training session which began at 8 a.m. Saturday morning and remain in training until 5 p.m. that day.

On April 25, an e-mail was circulated by Respondent authorizing stewards who were scheduled to work on April 29 and 30 to be excused from work on those two days. Later that day, Rick Dahl, Nembhard's supervisor, sent an e-mail to Nancy Delaney, Respondent's labor relations coordinator and admitted agent. The message stated that Nembhard was scheduled to work Friday night, and asked whether she could leave early to attend the training session on Saturday. Lamson-Scribner replied that day directing Dahl to work out the details with Nembhard and suggesting that she may want to be excused Friday night and work Sunday.

Dahl spoke to Nembhard during her work shift on the evening of April 25 and they agreed that she would take Friday and

[3] Those stewards are Duncan Craig, Joseph Dendera, Dennis Keenan, Nembhard, and Tomlins.

Saturday as excused days off, and that she would work on Sunday.

According to the testimony of Nembhard and Union Business Agent Meyer and Chief Shop Steward Tomlins, on April 25 Nembhard told them that she needed 1 extra day off—a third day of excused absence on Friday, because her Friday work schedule would result in her being awake for 24 hours if she attended the Saturday training session. Meyer and Tomlins asked Shop Steward Joseph Dendera to secure the extra day off for Nembhard.

Dendera testified that he told Gibson on April 26 that Nembhard needed to be excused for 1 extra day. Gibson asked why, and Dendera explained that her work-hours would result in her being awake for 24 hours either before or after the training session which was improper and unsafe. Gibson told him that she saw "no problem" with the request. Dendera testified that he specifically asked her whether Nembhard was excused Friday, Saturday, and Sunday nights and Gibson said she was, adding that she (Gibson) would contact Nembhard's Supervisor Dahl by e-mail. Dendera then told Meyer and Tomlins that Gibson authorized Nembhard to take 3 days off. Dendera's datebook for April 26 bears the notation: "Talked to Ms. Gibson about K. Nembhard. OK to have Fri, Sat, Sun nite off." Meyer and Tomlins corroborated Dendera's testimony that he told them that Gibson authorized 3 nights off.

Gibson became aware, by the April 25 e-mail, that stewards were excused from work for 2 days of training. She testified that on April 26, Dendera asked her if Nembhard was excused for the training. Gibson replied that she was excused, as were all other stewards. Gibson specifically denied that Dendera asked that Nembhard be excused for Friday, Saturday, and Sunday and Gibson denied approving a request that she be excused for those 3 days. Gibson assumed that Dendera's question related only to the previously authorized request for 2 days off for all stewards. When asked why she did not question Dendera's specific inquiry concerning Nembhard since permission had already been granted for 2 days off, Gibson replied that she was not "involved with the details." This presumably relates to how the grant of 2 days off would affect individual employees' specific work situation. In fact, Gibson stated that she was not aware of Nembhard's schedule.

Nembhard testified that on April 26, prior to her reporting to work at 7 p.m., she received a message on her home phone answering machine from Debbie Wise, Respondent's human resources assistant. According to Nembhard, Wise's message was that she was "approved for 3 days off, Friday, Saturday, and Sunday."

That evening, Nembhard reported to work and met Dendera. Both Nembhard and Dendera testified that Dendera told her that she had been approved for 3 days off, and that Nembhard replied that she already was aware of that through Wise's message.

Nembhard testified that following the end of her shift the next morning, April 27, she asked Wise if Gibson had sent her a "written response" concerning her request for time off. Wise replied that she did receive a response but could not find it. Nembhard requested an e-mail message approving the time off.

Wise's version of the conversation was that Nembhard asked her if she was excused for the training session. Wise replied that she would ask Gibson and let her know Gibson's response. Wise immediately sent an e-mail message to Gibson which stated: "Karen would like to know if she received permission to go to the shop steward training. Please let her know by e-mail tonight. The training is Sunday." Gibson immediately sent an e-mail message to Nembhard with a copy to Wise, which advised her to "please speak to your supervisor Rick. He will work out the schedule with you."

Upon receiving Gibson's e-mail message, Nembhard left her a message that evening asking why Gibson could not have given her a "yes or no" answer? When asked why she sought such an explicit answer if she believed that the request for the third day had already been transmitted by Wise, Nembhard stated that she wanted Gibson's assurance that she was excused for the days.

Gibson testified that when she received Wise's e-mail, she told Wise to inform Nembhard that she was excused for the training but had to work out the details with her supervisor. Gibson did not tell Wise that Nembhard was excused for Friday, Saturday, and Sunday, and Gibson did not specify for which days she had been excused. Gibson testified that she was unaware of Nembhard's schedule and was not informed that since she was working Friday night, special arrangements had to be made.

Wise denied receiving any earlier e-mails from Gibson on this subject as implied by Nembhard's testimony. Wise testified that the following day, April 28, she called and left a message on Nembhard's answering machine that Gibson had approved her absence to attend the training session and that she should work out the details with her supervisor. Wise specifically denied telling Nembhard that she was excused for Friday, Saturday, and Sunday. Thus, Wise denied leaving Nembhard a phone message on April 26, stating that her first involvement with this matter occurred on April 27 when Nembhard visited her office.

Nembhard testified that on Friday, April 28, she asked Dahl if Gibson had approved her request for time off on Sunday. Dahl said that he had not. Nembhard said that she had already been granted an excused day off on Sunday by Wise and through Dendera's conversation with Gibson, but that she wanted it confirmed in writing by Gibson. Dahl accepted Nembhard's representations and recorded her anticipated absence Sunday as excused.

Nembhard attended the training session on Friday and Saturday, April 28 and 29. She was absent from work on Sunday, April 30, for which one unexcused absence day was recorded in her personnel file.

On May 3, Nembhard again asked Dahl if he had been informed that she had an excused absence for Sunday, April 30. Dahl said he had not. That day, Dahl received a message from Gibson advising that she did not authorize an excused absence for Nembhard for Sunday. Dahl changed the record to reflect that her absence Sunday was not excused.

Nembhard conceded that she had never received any message from Gibson that she had an excused day off on Sunday notwithstanding her request for such confirmation.

Gibson stated that she was aware of rumors concerning upcoming union activity, as set forth below, when she was involved in the matter of Nembhard's request for extra time off. Two stewards, Dendera and Tomlins, were suspended for picketing at the shareholder's meeting. Nembhard and the two other stewards were not identified by Respondent as participating in the Union's demonstration at the meeting and were not listed in the complaint as those who Respondent suspended for such activity.

Respondent had in the past made accommodations to night-shift employees who were engaged in contract negotiations during the day in which they were scheduled to report to work. Respondent did not want those employees reporting to work at night after they had been continuously at work and in negotiations over a 3-day period. The schedules of those employees working at night were switched so that they would be scheduled to work during the day and then receive those days off so that they would be excused from work during the daytime negotiations. They did not receive any extra days off.

C. The Picketing at the Shareholder's Meeting and the Suspensions

Collective-bargaining negotiations for a successor agreement were held on March 8, 21 and 27, and then broke off without an agreement for a new date for resumption of the discussions. According to Gibson, the Union "was not as committed as management to reaching an early settlement." Accordingly, since the "early settlement talks were unproductive, we chose to withdraw our proposal for early negotiations and return to the normal bargaining timeline."

The Union decided to picket Respondent's annual shareholder meeting scheduled for May 4 at the Sheraton Hotel in Woodbridge, New Jersey. Meyer stated that the purpose of the picketing was to pressure Respondent to give the Union a date for continued bargaining.

On April 28, Meyer told Joel Gray, Respondent's director of human resources, that he intended to place an informational picket line at the shareholder's meeting because the Union was unable to get a negotiating date from Respondent. Gray replied that he had been made aware of the Union's proposed actions by Gibson, and advised Meyer that the Union's picketing was illegal based upon article 28 of the collective-bargaining agreement. Meyer disputed Gray's interpretation of that clause.

Article 28 of the contract states as follows:

> The Employer and the Union declare it to be their intention to prevent any suspension of work due to labor disputes during the term of this Agreement. To carry out this intention, the Employer agrees that there shall be no lockout of any of its Employees or discrimination against them because they have raised a dispute or grievance. The Union agrees that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slowdown whatsoever. The Union further agrees that any Employee engaging in an unauthorized strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business, shall be subject to immediate discharge at the discretion of the Employer with no recourse to the grievance procedure contained herein. However, the Employer agrees it will not hold the Union responsible for damages resulting from any such unauthorized action if the Union takes immediate action to advise all Employees that such unauthorized action is unauthorized and that Employees participating will be subject to discipline, up to and including discharge.

On April 28, Gibson sent a letter to Meyer stating that she had heard "rumors" that Respondent's employees "were considering setting up picket lines." Gibson advised that such conduct violated article 28 of the contract and warned that "any employee who participates in an unauthorized job action will be subject to immediate dismissal with no recourse to the grievance procedure. Picketing is an unauthorized job action. We do not wish to be placed in the position of terminating employees because of such a misguided action as picketing in violation of our agreement."

The letter, however, included an incomplete quotation from article 28. Respondent's excerpt began with the phrase "[t]he Union agrees that it will not call, participate in . . . . " and continued until the end of article 28. The letter thus omitted the first half of the first paragraph which sets forth the intent of the parties to "prevent any suspension of work due to labor disputes . . . . "

The letter, which was posted in the plant for more than 1 week according to Tomlins,[4] further stated:

> Please consider this as formal notice to you that employees may be planning to participate in an unauthorized job action. We expect that the Union will honor its duty to inform employees that the action is unauthorized and that any employee who participates will be subject to discharge. We ask that you do this to ensure that our employees who choose to engage in such activity fully appreciate the consequences of such acts.

Meyer's letter to Gibson in response stated that article 28 does not "pertain to peaceful informational picketing of a shareholders meeting."

The Union distributed a flyer to the employees which asked employees to engage in the "informational picket" at the shareholder's meeting. The flyer noted that it was an "authorized event" by the Union.

On May 4, two buses carried certain Respondent's employees and others from Peekskill to the shareholder's meeting at a hotel in New Jersey. The hotel was located about 50 miles from Respondent's Peekskill facility. The first bus, bearing Meyer, was met by officers of the local police department who told Meyer that his group could not picket or protest in any manner. Following a discussion, it was agreed that people could stand at the three entrances to the hotel, but could not march back and forth and could not disrupt traffic. However, one or two people stood in the roadway and gave handbills to occupants in the cars which stopped to receive them. Meyer further instructed the demonstrators that they should have a "silent protest" with

[4] The letter had an attachment which made an anonymous, derogatory reference to Gibson and Lamson-Scribner. There was testimony that the flyer was seen inside and outside the plant, but the evidence did not establish that the Union or its agents was responsible for its production or distribution.

no chanting, blowing whistles or making any noise, no comments directed at the cars entering or exiting the hotel, and no blocking of entrances. There was no evidence that any of these rules were violated.

About 50 of Respondent's employees were present at the hotel. Also in attendance were 15 to 20 nonemployees who were union members not employed by Respondent, and members of other local unions. Picket signs were worn only by people who were not employees of Respondent. Similarly, handbills were distributed only by nonemployees. Meyer specifically directed that no one employed by Respondent carry a picket sign or distribute a handbill because he sought to "make it as hard as possible" for Respondent to "retaliate" against its employees following its April 28 letter.

About 20 picket signs were utilized. The picket sign stated:

INFORMATIONAL
Unfair Labor Charges Against
ENGELHARD CORPORATION
By IBEW Local 1430
This Sign Is Not Intended To Interfere With,
Nor Restrain, Nor Coerce, The Rights of Anyone
From Entering Or Leaving This Facility

A handbill distributed by the Union at the site stated:

FAIR?

Engelhard workers in Georgia currently earn approximately $5.00 per hour more than Engelhard workers in Peekskill, New York for similar work.

Yet while profits soar in New York, the Company demands givebacks from its New York workers while the Union only asks for increases, not parity.

The Company has broken off negotiations leaving us to believe a strike is unavoidable thereby jeopardizing your profits that we helped to build.

As a shareholder in a company that may be forcing its workers out on strike at one of its most profitable plants you need to ask "what will happen to my stock?"

Of Respondent's employees who were present at the demonstration, only three were scheduled to work that day. The others were not scheduled to work because they either had a day off or were not scheduled to work the shift which occurred during the demonstration. The three employees who were scheduled to work that day received prior permission from Respondent to take the day off—either by taking a personal day or vacation day.

The complaint alleges that on May 4, Respondent engaged in unlawful surveillance of employees at the Sheraton Hotel. Meyer stated that during the picketing, which lasted about 1 hour, a cameraman videotaped the activities from a vehicle which was at times stationary and also moved about while taping. Tomlins stated that the photographer pointed the camera at him and others while they were 15 feet away from the camera. Upon seeing the photographer, certain employees expressed their fear to Meyer and Tomlins that they believed that they might be discharged or would get into "trouble" with Respondent.

Respondent's official Gray testified that Respondent had no idea of the scope of the picketing or the number of people who would be involved or what type of activities they would engage in. He authorized the videotaping in order to record and document attempts to disrupt the annual meeting, possible violent activities, and trespass. Gray further stated that Respondent intended to use the tape in the event that legal action, such as an injunction, was sought. He conceded, however, that no trespass, violence or disruption of the meeting occurred. Indeed, he admitted that the taping began as the demonstrators left the bus, before they could engage in any improper activities.[5]

Gray stated that he instructed the videotaper to remain at a distance from the pickets, not to approach them in any way, and not attempt to tape or "zoom in on" any individual person. The cameraman was told to take "wide" photographs to "understand what was going on." Gray conceded, however, that the tape was later used to identify which employees participated in order to discipline them, but stated that that was not the primary purpose of the taping.

On the day of the demonstration, 21 employees were at work in the production area on the day shift, whereas on a typical day, 27 to 28 employees would be working. Meyer testified that he told employees who were working that day to work as hard or harder than normal.

On May 12, Gibson sent a letter to the Union and posted a copy in the plant.[6] The letter said essentially that despite Respondent's warning in its April 28 letter, certain employees picketed the annual shareholder's meeting, and that Respondent considered picketing during the term of the contract to be in violation of article 28 of their agreement.[7] This letter also contained the same incomplete quotation of article 28 as was included in the April 28 letter. The letter advised that Respondent "will begin taking formal disciplinary action as a result of the picketing." The letter noted that although Respondent had the right to terminate the employees for such conduct it had decided to suspend them for 3 workdays "for their participation in this action."

Lamson-Scribner testified that although Respondent had the right to discharge the employees because of their violation of article 28 of the contract, he did not do so because he believed that they had been "misled by the Union leadership" and accordingly did not believe that discharge would be proper. The letter also advised that Respondent would be taking action

[5] An unfair labor practice charge against the Union relating to the picketing was dismissed by the Regional Director. That dismissal was upheld by the General Counsel.

[6] This letter, like the April 28 letter, was posted at the plant for more than 1 week, according to Tomlins.

[7] Accordingly, Respondent contends that "picketing" was the violation of article 28 and not a work stoppage. Lamson-Scribner's testimony supports that position. However, on brief, Respondent argues that the employees interfered with its business in violation of article 28 because fewer employees than normal reported to work on May 4. I reject that argument. The three employees who were scheduled to work that day received permission to be absent. The rest were off duty. In addition, no proof was offered that Respondent's business was interfered with.

against the Union for not fulfilling its obligations as set forth in article 28.

Finally, the letter stated as follows:

> I feel a responsibility to let you know there are further rumors that additional pickets are being planned by our employees with union support. As we said in our original letter, we consider any future actions like those described in the Collective Bargaining Agreement to be a violation of Article 28. If such actions occur, those employees who choose to participate are subject to immediate dismissal, without recourse to the grievance procedure. We would ask for your help once again in fulfilling your obligations to ensure that such future instances do not happen.

The letters of April 28 and May 12 have been alleged as unlawful threats to unit employees of discharge for participating in protected concerted activities. Respondent's official Gray testified that Respondent had no intention of threatening employees when it posted the letters. He and Gibson stated that the purpose of the letters was to ensure that Respondent's position concerning activities in violation of article 28 was made known to the workers.

Respondent suspended 38 employees for 3 workdays effective May 15.[8] The suspension letters state, in relevant part, as follows:

> The reason for this suspension is your violation of Paragraph 28 of the Collective Bargaining Agreement, which occurred on May 4, 2000.
>
> Please be advised that this is a final warning. Future misconduct, including any violation of Paragraph 28, will subject you to discharge for cause.

The letters advised the workers that during their suspension they were not authorized to enter Respondent's premises. Because the employees work on nonconsecutive workdays, they were not eligible to work overtime on days that they were not regularly scheduled to work during their suspension since they could not enter the facility on those days.

The Union filed a grievance as to the suspensions which Respondent denied, arguing that the grievances were not arbitrable since the employees picketed in violation of article 28 of the contract as to which employees have no recourse to the grievance procedure. The suspensions have been alleged as an unfair labor practice.

[8] Those suspended were: Christopher Bahr, Gregory Borelli, Eric Camper, Wayne Cantrell, Arthur Chase, Carlos Colmenares, Roger Croft, Joseph Dendera, Vincent Diaz, Dallas Dickens, Peter DiNapoli, Warren Dunn, Lori Elsner, Nelvis Esteves, Carlos Fernandes, Francis Hard, Pamela Hard, James Hamilton, Ron Hyslop, John Keels, Thomas Kimbrew, Bernard Kopf III, James Mahoney, George Hans, Dana Mason, Kathleen Nenni, James Papa, Marcus Ruff, Richard Selleck, George Sekel, Marc Sierzega, Daniel Smetana, William Sinzer III, Paul Szklenka, Jeffrey Tomlins, Robert Vitolo, Donald Vassallo, and Keith Urban. Peter DiNapoli received a suspension letter dated May 12, but a letter dated May 17 stated that "after further investigation" Respondent rescinded its suspension and final warning and advised DiNapoli that he would be reimbursed for pay lost during his suspension.

III. ANALYSIS AND DISCUSSION

A. The Alleged Threat to Move the Plant

There is a sharp credibility issue with respect to the alleged threat to move the plant. Meyer and Tomlins both testified that Gibson said that if the Union demanded a six-percent increase the Company would move its plant down South. Their testimony is supported by notations made in their datebooks which recite that Gibson made the statement and the fact that Respondent does have operations in Southern states.

However, detracting from their testimony is the fact that the charges filed do not reflect the threat allegedly made by Gibson. The charges allege that the Respondent "threatened to close its operations if contract negotiations did not go their way." That allegation is markedly different than the remark attributed to Gibson, that if the Union demanded a six-percent increase Respondent would move its plant down South. Thus, Gibson did not allegedly threaten to close its operation if negotiations were not favorable to it. The alleged threat was that it would move if the Union sought a specific wage increase.

I am aware that counsel to the Union and not Meyer or Tomlins signed and presumably prepared the charge. But the information inserted in the charge must have come from the two union representatives. If, as they testified, detailed notations were made in their datebooks within moments of their utterance by Gibson they certainly would have informed counsel of the exact nature of the alleged threat.

Equally persuasive is the testimony of Respondent's witnesses Lamson-Scribner, Gibson, and Delaney all of whom denied that the remark was made. Delaney testified convincingly that had the comment been made she would have questioned it since she and her husband are employed in the Peekskill plant.

To some degree, therefore, the evidence concerning the alleged threat is in equipoise—no witness deserving greater credibility than the other. Based upon the evidence, I cannot find that counsel for the General Counsel has satisfied her burden of establishing by a preponderance of the credible evidence that Gibson made the threat attributed to her. I accordingly shall recommend that this allegation of the complaint be dismissed.

B. The Alleged Denial of an Excused Absence for Nembhard

The complaint alleges that Nembhard was denied an excused absence despite having been granted such a day off by Gibson.

I find that this allegation must be dismissed. I cannot find credible General Counsel's witnesses' testimony that Gibson in fact granted Nembhard Sunday as a third excused day off.

In making this finding I rely upon the undisputed documentary record—the e-mails which were part of the official company chronicle of events and which were a contemporaneous, verbatim account of messages transmitted. Thus, I credit the testimony of Wise that her first involvement in the matter occurred in the morning of April 27 when Nembhard asked her if she was excused for the training session. Wise's e-mail to Gibson which stated that Nembhard wanted to know if she had permission to attend the training demonstrates that this was her first involvement in Nembhard's request.

Accordingly, Wise could not have phoned Nembhard the day before, April 26, with a message that she had been approved for 3 days off when it was undisputed that Wise asked Gibson on April 27 whether she had such permission. I therefore cannot credit the testimony of Dendera that Gibson gave her approval for 3 days off on April 26. The crucial evidence—the alleged phone message of April 26—was not preserved.

Dendera's notation in his datebook that Gibson approved 3 days off on April 26 is significant especially when combined with corroboration by Nembhard, Meyer, and Tomlins that he advised them that Gibson approved the day off. However, I also find credible Gibson's denial of such approval. When the documentary evidence is evaluated for reliability, the undisputed e-mails which establish that an extra day off was not specifically requested or granted—must be given greater weight.

Further, when Nembhard asked Gibson on April 27 why she could not have given her a "yes" or "no" answer to her request, Nembhard did not refer to the alleged phone message left by Wise the day before which allegedly granted her request for 3 days off. Instead, Nembhard was seeking a definite answer from Gibson as to the extra day off which, according to Nembhard, had already been transmitted through Wise. There was testimony that Dahl considered Nembhard to be reliable, hardworking, and conscientious. That may be true. But Nembhard could also be mistaken as to the facts.

In addition, Respondent's actions toward the shop stewards are inconsistent with a grant of a third day off for Nembhard. Respondent liberally granted 2 days off for all stewards to attend the training. In the past, when night-shift employees were scheduled to attend daytime negotiations their schedules were changed to the day shift and those days were marked as excused absences. Thus, they were not given extra days off so they could be present at negotiations.

Even assuming that I find that Respondent granted Nembhard Sunday as an excused absence and then withdrew its agreement, I cannot find that General Counsel has established that the Union's activities in picketing the shareholders meeting was a motivating factor in the denial of the excused day off for Nembhard. *Wright Line*, 251 NLRB 1083 (1980). I find no causal connection between the two events. Nembhard apparently was not present during the picketing and was not part of the group who were suspended for engaging in the picketing. Although she was a steward there was no evidence of her activities in that position. The mere fact that the expected union activities occurred at about the same time that Gibson was involved with Nembhard's request to attend the shop steward training cannot provide the necessary connection to establish a prima facie case.

I accordingly find and conclude that Gibson did not grant Nembhard an excused third day of absence, and did not unlawfully thereafter deny such approval. I will recommend that this allegation be dismissed.

C. The Picketing at the Shareholders Meeting

1. Did the Union engage in picketing?

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by disciplining 38 employees because they participated in the Union's demonstration at the Sheraton Hotel on May 4.

Respondent argues that the picketing violated the no-strike no-picketing clause set forth in article 28 of the collective-bargaining agreement and that its suspension of the employees was justified because the provision permits discipline of workers who engage in such conduct. General Counsel first argues that the demonstration did not constitute picketing and therefore no violation of article 28 occurred. General Counsel argues alternatively that even if it the employees picketed they were engaged in protected concerted activity and that Respondent has not established that the Union waived the statutory rights of off-duty employees to engage in such picketing.

The evidence establishes that classic, traditional picketing occurred at the Sheraton Hotel on May 4. Thus, as the photographs and videotape of the picketing demonstrate, individuals carrying placards stood at the hotel entrances, and that pickets handed leaflets to cars which stopped to receive them. *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999). Even if the demonstrators merely stood with picket signs talking to each other, picketing has been proven. Patrolling either with or without signs is not essential to a finding of picketing. *Service Employees Local 87 (Trinity Building Co.)*, 312 NLRB 715, 743 (1993); *Mine Workers District 29 (New Beckley Mining Co.)*, 304 NLRB 71, 72 (1991).

General Counsel argues that no picketing occurred since the demonstration occurred at a nonwork place and accordingly no appeals could be made to employees or customers to refuse to enter a place of business or to boycott the business. *Comcast Television of New Haven*, 325 NLRB 833, 836 (1998). "The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965). "Picketing has been defined as conduct 'which may induce action of one kind or another irrespective of the nature of the ideas which are being disseminated.'" *Service Employees Local 254 (Womens & Infants Hospital)*, 324 NLRB 743, 749 (1997).

The evidence is clear that picketing took place. Picket signs were carried by 20 individuals and union official Meyer referred repeatedly in his testimony to the "picketing." The signs stated that unfair labor practice charges were filed against Respondent. In addition, a handbill was distributed which noted that the unit employees were underpaid, a strike may occur and which urged the shareholders arriving for the meeting to question Respondent's conduct toward its employees and the profitability of the company. The picketing and handbilling sought to induce action by the shareholders to, at a minimum, challenge Respondent's actions concerning its employees, and at a maximum, to urge shareholders to sell their stock before the occur-

rence of an "unavoidable [strike] jeopardizing your profits. . . ." The ultimate purpose of the Union's action was to "advance the cause of the union" by pressuring the shareholders to encourage Respondent to bargain with it. I accordingly find that the Union picketed at the Sheraton Hotel on May 4.

2. The suspensions

The right to picket is one of the basic protected activities under Section 7 of the Act which provides that employees have the right to "assist labor organizations" and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The picketing had as its express purpose, as set forth on the signs, the protest of the unfair labor practices which had already been filed by the Union. Another object was to cause Respondent's stockholders to persuade it to return to the bargaining table. Both purposes are consistent with employees' rights under Section 7 of the Act. Picketing in pursuit of those ends was clearly permissible.

Respondent asserts that it was justified in suspending employees for engaging in picketing at the Sheraton Hotel in violation of article 28 of the collective-bargaining agreement. As set forth above, that Article contains a traditional no-lockout, no-strike, no-picketing clause.

The Supreme Court has stated that such clauses permissibly waive "the employees' right to strike and . . . the employers' right to lockout to enforce their respective economic demands during the term of those contracts. . . . .Individuals violating such clauses appropriately lose their status as employees." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 278, 280 (1956). The Court has also held, however, that a waiver of a statutorily protected right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 705, 708 (1983).

In deciding whether a union, by its contractual no-picketing and no-strike clause, waived employees' Section 7 right to picket or strike, the Respondent must prove as an affirmative defense that such activity was unprotected because it violated the no-picketing or no-strike provision. *Silver State Disposal Service*, 326 NLRB 84, 85 (1998),

Whether the Union waived its member-employees' Section 7 right to picket, "turns upon the proper interpretation of the parties' agreement." *Lear Siegler, Inc*., 293 NLRB 446, 447 (1989). To determine that intent, the Board examines the contract language and relevant extrinsic evidence. *Silver State*, above, at 86; *Lear Siegler*, above, at 447; *Indianapolis Power Co.*, 291 NLRB 1039, 1040 (1988).

The Board has stated that in construing such a clause, only "an objective construction" of the provision need be referred to, and that in "interpreting contractual language, words must be given their 'ordinary and reasonable meaning'". *Silver State*, above, at 86.

Here, as in *Silver State*, no extrinsic evidence has been adduced concerning the parties' intent regarding the no-strike clause. Thus, as in *Silver State*, "the language of the express no-strike clause 'is plainly the only proper guide for determining whether the employer and the union intended to forbid' the unauthorized [strike]." 326 NLRB at 87.

Respondent argues for a literal interpretation of article 28, preferring simply that the clause be read in the disjunctive—each paragraph given its own, separate meaning. Thus, according to Respondent, that sentence providing that "the Union agrees that it not call, participate in, or sanction . . . any picketing" is controlling and exclusive of the rest of article 28.

However, I find that, consistent with the precedents above, the entire provision must be read to glean the parties' intent to prohibit picketing. Thus, when an "objective construction" is given to article 28, it is clear that the parties' intent, as set forth in the first sentence, in prohibiting picketing is to "prevent any suspension of work. . . ." That interpretation is supported by the following language in the clause. "To carry out this intention [to prevent any suspension of work due to labor disputes] Respondent agrees not to lock out workers, and the Union agrees that it will not call, participate in, or sanction any picketing activity."

Thus, article 28, when properly read as a whole, sets forth a clear intention by the parties that picketing is prohibited where it leads to a suspension of work due to labor disputes. There has been no evidence that the picketing caused a suspension of work. The picketing was engaged in by nonemployees and possibly by employees 50 miles away from the plant at a hotel which was the location of Respondent's annual shareholder's meeting. Even assuming that Respondent's employees, who were either excused from work or off duty, engaged in such picketing, there has been no showing that a suspension of work resulted from the picketing.

In addition, I reject Respondent's reliance upon article 28 to discipline its employees who engaged in the demonstration. Article 28 authorizes discipline if the employee engaged in an "unauthorized strike, boycott, picketing, organized work slowdown or stoppage, or any other type of interference with the Employer's business." As set forth above, the employees were suspended for engaging in picketing. Clearly, the picketing was not unauthorized. It was authorized by the Union and the picketing was peaceful.

Based upon the above, I find that Respondent has not met its burden of showing that the Union "clearly and unmistakably" waived the employees' right to engage in union or concerted activities by their picketing or engaging in the demonstration on May 4. I find that their engaging in such activities was protected by Section 7 of the Act, and I accordingly find and conclude that Respondent's suspension of 38 employees for participating in the demonstration violated Section 8(a)(3) and (1) of the Act.

3. The alleged threats to discharge

The amended complaint alleges that Gibson's letters of April 28 and May 12[9] unlawfully threatened employees with discharge for participating in protected concerted activities.

[9] Respondent asserts that the allegation concerning the May 12 letter, asserted for the first time in the amended complaint, should be barred by Section 10(b) of the Act. I find that the complaint amendment meets the test for relatedness set forth in *Nickels Bakery of Indiana*, 296 NLRB 927 (1989). This is particularly so where the April 28 letter (erroneously called the April 27 letter in the charge) was alleged in the charge filed on May 1, 2000, and the original complaint alleges the unlawfulness of the April 28 letter. The April 28 and the May 12 letter involve the same allegations of the complaint, they arise out of the

I credit Tomlins' testimony that the letters were posted in the plant for more than 1 week. Although the April 28 letter does not mention the picketing at the Sheraton Hotel, it is clear that Respondent was aware, through Gibson and Gray, that the shareholder's meeting was the intended site for the picketing. Further, inasmuch as the letter was posted at the plant for more than 1 week, Respondent permitted the message to remain posted without alteration even after the May 4 picketing, which was 6 days after the posting.

Thus, Respondent cannot argue that the letter was addressed to picketing or possible work stoppages at the plant which would arguably be prohibited by Article 28. Moreover, the May 12 letter specifically refers to the April 28 letter as being a reference to picketing at the shareholder's meeting.

Respondent's official Gray testified that the letters' intent was not to threaten the employees. However, its motive is irrelevant.

The test under Section 8(a)(1) does not 'turn on the employer's motive or whether the coercion succeeded or failed [but instead on] whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere* with the free exercise of employee rights under the Act." *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995) (emphasis in original).

Inasmuch as I have found, above, that employees were unlawfully suspended for participating in the demonstration on May 4, it follows that the April 28 threat to discipline them if they engaged in that right to participate in union and concerted activities violates Section 8(a)(1) of the Act. The threat reasonably tended to interfere with their right to engage in such activities.

Similarly, the letter of May 12 informed employees that they would be disciplined "as a result of the picketing." It added that it was aware that "there are further rumors that additional pickets are being planned by our employees with union support. As we said in our original letter, we consider any future actions like those described in the collective bargaining agreement to be a violation of Article 28."

Respondent argues that the May 12 letter simply informs employees of their obligations under article 28. However, I believe that Respondent reads the letter too narrowly. Specific mention was made of the May 4 picketing and its discipline of employees for engaging in such conduct allegedly in violation of article 28. Given the context of this letter, the fact that employees were suspended beginning on the day the letter was posted, and that Respondent should have been aware that article 28 was not violated by the picketing, I find that this letter constitutes an implicit threat that similar disciplinary action would be taken against other employees if they engaged in protected, concerted activity. *Webco Industries*, 327 NLRB 172, 173 (1998).

I accordingly find and conclude that the letters of April 28 and May 12 violated Section 8(a)(1) of the Act.

same circumstances, and Respondent's defense, that they are not unlawful threats because the picketing was a violation of the contract, is identical.

4. The alleged surveillance

a. The affirmative defense

The complaint alleges that Respondent engaged in unlawful surveillance of its employees' union activities at the Sheraton Hotel on May 4. Respondent stipulated that it videotaped the picketing and handbilling activities which took place at that location.

Respondent argues that this allegation is barred by Section 10(b) of the Act which requires that a charge be filed within 6 months of an unfair labor practice. Here, no charge has been filed alleging surveillance of employees. Accordingly, Respondent contends that the complaint allegation must be dismissed as untimely.

In considering the sufficiency of a charge to support an allegation in the complaint under Section 10(b), "the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge." *Nickels Bakery of Indiana*, 296 NLRB 927 (1989).

As here, *Nickles Bakery* involved a situation where a complaint contained an allegation which was not the subject matter of a charge. The Board held that in determining whether the complaint allegations are sufficiently related to the charge allegations, it applies a "closely related" test comprised of the following factors: (1) whether the allegations involve the same legal theory (2) whether the allegations arise from the same factual circumstances or sequence of events and (3) whether a respondent would raise similar defenses to the allegations.

Under this "closely related" test, I find that the complaint allegation of unlawful surveillance is closely related to the timely filed amended charge which alleges that Respondent coerced shop stewards in the exercise of their Section 7 rights by threatening to discipline union members if they engage in peaceful picketing of Respondent's stockholder's meeting.

First, the complaint allegation of unlawful surveillance of the picketing and the charge alleging a threat to discipline union members for peaceful picketing involve the same legal theory—the interference with employees' Section 7 right to peacefully picket Respondent's shareholder's meeting. Second, the complaint allegation arises from the same factual circumstances and sequence of events as the charge—the picketing of Respondent's May 4 shareholder's meeting and the videotaping of union members who were present at the picketing. "The Board has generally found that there is [a] sufficient relation between the charge and [subsequent allegations] in circumstances involving 'acts that are part of the same course of conduct . . . .'" *Ross Stores, Inc*., 329 NLRB 573 (1999). Finally, the allegations in the charge and complaint share a common defense—both are predicated upon the argument that the picketing violated the collective-bargaining agreement and was unprotected.

I accordingly reject the affirmative defense that the complaint allegation of surveillance must be dismissed as untimely pursuant to Section 10(b) of the Act.

b. The merits

In *National Steel & Shipbuilding Co*., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), the Board af-

firmed the guiding principles set forth in *F. W. Woolworth Co*., 310 NLRB 1197 (1993) concerning surveillance of the union activities of its employees by means of videotaping such activities. The Board stated:

> [A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals.
>
> The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity.
>
> Rather, the Board requires an employer in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. 'The Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.' The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case.

"The Board has long held that, absent proper justification, the photographing of employees engaged in union or protected concerted activities violates the Act because it has a tendency to intimidate them." *Titan Wheel Corp. of Illinois*, 333 NLRB 190, 194 (2001). Absent justification, therefore, it is clear that the videotaping which occurred at the Sheraton Hotel on May 4 had a tendency to create fear among employees of future retaliation. *Waco, Inc*., 273 NLRB 746, 747 (1984).

The facts here present a clearer case for finding that the videotaping had a tendency to create fear. Thus, the photography was accompanied by a threat that would suggest coercion. As set forth above, Gibson's letter of April 28 warned that any employee who participated in an unauthorized job action, such as the contemplated picketing, was subject to immediate discharge. According to the testimony of Gray and Meyer, at the time that Gibson wrote the letter she and Gray were aware that the picketing would take place at the shareholder's meeting.[10] I have found that the letter of April 28 constitutes, as alleged, an unlawful threat of discipline for their engaging in union and protected concerted activity.

By unlawfully threatening employees with discharge if they engaged in the picketing and then videotaping them, the workers could reasonably fear that their presence at the demonstration would result in discipline. The fact that those employees who did appear at the picketing were first threatened, then identified through the videotape and finally suspended for their allegedly engaging in picketing provides a strong basis for concluding that the videotaping had as its purpose the instillation of fear that by appearing at the demonstration they would be disciplined. In this connection it is important to note that Meyer sought to protect the employees from disciplinary action pursuant to the no-picketing clause by directing them not to engage in picketing or handbilling. However, their abstention from those activities had no effect upon Respondent's decision to suspend them. Their mere appearance at the picketing was sufficient.

"The record provides no basis for Respondent reasonably to have anticipated misconduct by those picketing and handbilling, and there is no evidence that misconduct did, in fact, occur." *Woolworth*, above. Respondent official Gray's assertion that he directed that the activities be videotaped in order to document attempts to disrupt the annual meeting and record instances of possible violent or illegal activities, and to obtain an injunction if necessary, are not sufficient to justify the photography. As set forth above, photographing in the mere belief that "something might happen" does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. *Sonoma Mission Inn & Spa*, 322 NLRB 898, 902 (1997).

First, the taping began as the demonstrators began to leave the bus upon its arrival at the hotel, clearly before they could engage in any misconduct. *Sonoma,* above, at 902.Thus, the activity of taping them had nothing to do with any possible illegal activity but to record who was part of the Union's protest. Indeed, Gray conceded that the photographs were used to identify the employees involved for the purpose of imposing discipline for their picketing. It should be noted in this regard that there was no evidence that Respondent's employees carried picket signs or distributed handbills. Meyer's testimony that none did so is uncontradicted.

Respondent further argues that it permissibly sought to document the employees' activity which was in violation of the contract's no strike-no picketing clause. However, as set forth above, I find that no violation of that clause occurred because the purpose of the clause was to prevent work stoppages and the suspension of work, neither of which occurred as a result of the picketing. Accordingly, I cannot find that Respondent had even a "colorable basis" for justifiably videotaping the picketing. See *Roadway Express*, 271 NLRB 1238, 1244 (1984).

Respondent has presented no credible evidence of a justification for its videotaping of the Union's picketing and handbilling at the Sheraton Hotel. Accordingly, I conclude that by conducting such surveillance it violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Engelhard Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1430, International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending the following employees for 3 days in May, 2000, for participating in a union demonstration, Respondent violated Section 8(a)(3) and (1) of the Act:

> Christopher Bahr, Gregory Borelli, Eric Camper, Wayne Cantrell, Arthur Chase, Carlos Colmenares, Roger Croft, Joseph Dendera, Vincent Diaz, Dallas Dickens, Peter DiNapoli, Warren Dunn, Lori Elsner, Nelvis Esteves, Carlos

[10] Gibson's reference to the picketing in the May 12 letter establishes that the April 28 letter was designed to advise employees that their participation in the anticipated picketing was a violation of the contract.

Fernandes, Francis Hard, Pamela Hard, James Hamilton, Ron Hyslop, John Keels, Thomas Kimbrew, Bernard Kopf III, James Mahoney, George Hans, Dana Mason, Kathleen Nenni, James Papa, Marcus Ruff, Richard Selleck, George Sekel, Marc Sierzega, Daniel Smetana, William Sinzer III, Paul Szklenka, Jeffrey Tomlins, Robert Vitolo, Donald Vassallo, Keith Urban.

4. By engaging in surveillance of employees engaged in union activities, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with discharge on April 28 and May 12, 2000, if they engaged in union activities, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended the employees named above, I find that it must be ordered to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

There was testimony to the effect that the employees were suspended for nonconsecutive days, and that during the days upon which they were not suspended they were prohibited from entering Respondent's premises. Accordingly, they were not eligible to work those days and therefore not eligible to receive overtime pay during such days. General Counsel alleges that their inability to receive overtime pay should be remedied in this Decision. Inasmuch as I find that this issue was not fully litigated at the hearing, this matter should be raised in the Compliance part of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Engelhard Corporation, Peekskill, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or discriminating against employees for participating in Union activities or protected concerted activities.

(b) Engaging in surveillance of employees engaged in union activities and protected concerted activities.

(c) Threatening employees with discharge if they engage in union activities or protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

Christopher Bahr, Gregory Borelli, Eric Camper, Wayne Cantrell, Arthur Chase, Carlos Colmenares, Roger Croft, Joseph Dendera, Vincent Diaz, Dallas Dickens, Peter DiNapoli, Warren Dunn, Lori Elsner, Nelvis Esteves, Carlos Fernandes, Francis Hard, Pamela Hard, James Hamilton, Ron Hyslop, John Keels, Thomas Kimbrew, Bernard Kopf III, James Mahoney, George Hans, Dana Mason, Kathleen Nenni, James Papa, Marcus Ruff, Richard Selleck, George Sekel, Marc Sierzega, Daniel Smetana, William Sinzer III, Paul Szklenka, Jeffrey Tomlins, Robert Vitolo, Donald Vassallo, Keith Urban.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions, and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Peekskill, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2001

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

WE WILL NOT suspend or discriminate against our employees for participating in union activities or protected concerted activities.

WE WILL NOT engage in surveillance of our employees engaged in union activities and protected concerted activities.

WE WILL NOT threaten our employees with discharge if they engage in union activities or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them:

Christopher Bahr, Gregory Borelli, Eric Camper, Wayne Cantrell, Arthur Chase, Carlos Colmenares, Roger Croft, Joseph Dendera, Vincent Diaz, Dallas Dickens, Peter DiNapoli, Warren Dunn, Lori Elsner, Nelvis Esteves, Carlos Fernandes, Francis Hard, Pamela Hard, James Hamilton, Ron Hyslop, John Keels, Thomas Kimbrew, Bernard Kopf III, James Mahoney, George Hans, Dana Mason, Kathleen Nenni, James Papa, Marcus Ruff, Richard Selleck, George Sekel, Marc Sierzega, Daniel Smetana, William Sinzer III, Paul Szklenka, Jeffrey Tomlins, Robert Vitolo, Donald Vassallo, Keith Urban.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

ENGELHARD CORPORATION